Savarathanam a/l Muniandy & Anor v DXN Marketing Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-02–1101 OF 2011
ABU SAMAH, ABDUL WAHAB PATAIL AND DAVID WONG JJCA
17 JULY 2013

Contract — Agreement — Distribution agreement — Change of marketing schemes — Unilateral alteration — Affecting calculation of commissions and bonuses — Structure approved by regulatory authority — Whether respondent prohibited from changing marketing schemes — Whether original marketing schemes existed for 11 years created a contract — Whether changes requires appellants consent — Whether appellants independent distributors

The appellants were independent distributors attached to Daxen Marketing Sdn Bhd ('Daxen'), a multi level marketing company selling health supplements, since the year 1994. Daxen went into liquidation in 1996 but the same was then taken over by one of the original directors resulting in a change of name into DXN Marketing Sdn Bhd, the respondent herein. The appellants' distributorship was governed by the terms of the original marketing plan which had set-out the manner in which the commissions and bonuses were calculated. This plan was popularly known as OMP which remained in place until on or about July 2005 when the respondent unilaterally altered the structure upon which commissions were to be paid. This plan was approved by the relevant regulatory authority and was known as Simplified and Improved Marketing Plan ('SIMP'). The appellants contended that the respondent's unilateral replacement of OMP with SIMP resulted in a sizeable drop in the commissions earned by them. In dismissing the appellants application, the learned judicial commissioner held, inter alia, that the fact that there was no express provision in the OMP does not prohibit the defendant from changing the marketing plan to SIMP. Before this court the appellants contended that the existence and implementation of OMP for 11 years had created a contract between them and the respondent and the said contract could not be varied at the 'whims and fancy' of the respondent. The appellant further contended that in view of the alleged devastating effect on the earnings of the appellants, OMP could not be changed without the consent of the appellants.

Held, dismissing the appeal with costs of RM40,000:

(1) The OMP and SIMP schemes were simply marketing schemes. They were designed with the interests of the company and its distributors. It was a balancing act in that the scheme must be such that the company

makes a decent profit but attractive enough in terms of earnings for people to become distributors of the company's products. Hence, it is only logical that such schemes must be designed and constructed by the management of the respondent. It is also common sense that such schemes could not remain in perpetuity for the simple reason that marketing schemes must be flexible so that it can be changed to reflect the prevailing business environment in which the respondent was operating in (see para 12).

(2) As independent distributors, the appellants were bound by the marketing scheme employed by the respondent. They were never employed by the respondent. They actually joined the respondent as independent distributors with a view to benefit from the marketing scheme employed by the respondent. And in any event, they are fully entitled to terminate their distributorship if they, at any time, feel that SIMP or any other marketing scheme is not in their economic or financial interest (see para 13).

(3) It is also not insignificant that the respondent's conducts, in view of its involvement in direct selling, are regulated by the Direct Sales and Anti-Pyramid Scheme Act 1993. The SIMP was approved by Ministry of Domestic Trade and Consumer Affairs and what that means was that SIMP has statutory force. Even the Legislature recognises the fact that such marketing schemes need to change but such change must be done with their consent to protect the public (see para 14).

[Bahasa Malaysia summary

Perayu-perayu adalah pengedar-pengedar bebas kepada Daxen Marketing Sdn Bhd ('Daxen'), syarikat pemasaran *multi level* menjual makanan kesihatan tambahan, semenjak tahun 1994. Daxen dibubarkan pada tahun 1996 tetapi syarikat tersebut diambil alih oleh salah seorang pengarah asal mengakibatkan pertukaran nama kepada DXN Marketing Sdn Bhd, responden di sini. Pengedaran perayu-perayu dikawal oleh terma-terma pelan pemasaran asal yang mana menetapkan cara di mana komisen dan bonus dikira. Pelan ini telah dikenali sebagai OMP yang kekal sehingga atau lebih kurang pada Julai 2005 apabila responden secara unilateral mengubah struktur di mana komisen akan dibayar. Pelan ini diluluskan oleh pihak berkuasa kawal selia yang berkaitan dan dikenali sebagai *Simplified and Improved Marketing Plan* ('SIMP'). Perayu-perayu berhujah bahawa penggantian unilateral responden terhadap OMP dengan SIMP mengakibatkan penurunan besar dalam komisen yang diperolehi oleh mereka. Dalam menolak permohonan perayu-perayu, pesuruhjaya kehakiman yang bijaksana memutuskan, antara lain, fakta bahawa tidak terdapat peruntukan nyata dalam OMP tidak melarang defendan daripada menukar pelan pemasaran kepada SIMP. Di hadapan mahkamah ini perayu-perayu berhujah bahawa kewujudan dan pelaksanaan OMP untuk 11 tahun telah membentuk kontrak antara mereka dan responden dan kontrak

tersebut tidak dapat dipelbagaikan mengikut 'whims and fancy' responden. Perayu selanjutnya berhujah bahawa mengambil kira kesan buruk yang didakwa ke atas pendapatan perayu-perayu, OMP tidak dapat ditukar tanpa izin perayu-perayu.

Diputuskan, menolak rayuan dengan kos sebanyak RM40,000:

(1) Skim OMP dan SIMP adalah hanya skim pemasaran. Ia direka untuk kepentingan syarikat dan pengedar-pengedarnya. Ia adalah tindakan imbangan di mana skim mesti seperti syarikat membuat keuntungan yang memuaskan tetapi cukup menarik dari segi pendapatan untuk orang menjadi pengedar-pengedar barangan syarikat. Maka, ia adalah logik bahawa skim sedemikian mesti direka dan dibentuk oleh pengurusan responden. Ia juga adalah pengetahuan am bahawa skim sedemikian tidak boleh kekal selama-lamanya atas sebab yang mudah bahawa skim pemasaran mestilah fleksibel dengan itu ia boleh ditukar untuk membayangkan persekitaran perniagaan semasa di mana responden sedang beroperasi (lihat perenggan 12).

(2) Sebagai pengedar-pengedar bebas, perayu-perayu terikat dengan skim pemasaran yang digunakan oleh responden. Mereka tidak diambil bekerja oleh responden. Mereka sebenarnya bekerja dengan responden sebagai pengedar-pengedar bebas untuk mendapatkan faedah daripada skim pemasaran yang digunakan oleh responden. Walau bagaimanapun, mereka berhak dengan penuh untuk menamatkan hak pengedaran mereka jika mereka, pada bila-bila masa, merasa bahawa SIMP atau skim pemasaran lain bukan kepentingan kewangan atau ekonomi mereka (lihat perenggan 13).

(3) Ia juga tidak penting bahawa tingkah laku responden, mengambil kira penglibatannya dalam jualan terus, dikawal selia oleh Akta Jualan Langsung dan Skim Anti-Piramid 1993. SIMP diluluskan oleh Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna dan apa yang dimaksudkan adalah bahawa SIMP mempunyai kuat kuasa statutori. Perundangan juga mengiktiraf fakta bahawa skim pemasaran sedemikian perlu perubahan dan perubahan sedemikian mesti dilakukan dengan izin mereka untuk melindungi orang awam (lihat perenggan 14).]

Notes

For a case on distribution agreement, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2970.

Cases referred to

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151, FC (refd)

Legislation referred to

Direct Sales and Anti-Pyramid Scheme Act 1993

Appeal from: Civil Suit No S-22–179 of 2007 (High Court, Alor Setar)

Americk Sidhu (Americk Sidhu) for the appellants.
Siau Suen Miin (Siau Suen Miin & Tan) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal is against the decision of the High Court in which the learned judicial commissioner ('the JC') after a full trial dismissed the appellants' claims which concerned the respondent's right to change a marketing plan in respect of the appellants' entitlement to income from the distributions of the products of the respondent.

[2] We heard the appeal and after giving due consideration to respective submissions of counsel, we dismissed the appeal with costs. We now give our reasons.

BACKGROUND FACTS

[3] Both the appellants are independent distributors attached to Daxen Marketing Sdn Bhd ('Daxen') since the year 1994. Daxen is a multi level marketing company selling health supplements.

[4] Daxen went into liquidation in 1996 but the same was then taken over by one of the original directors resulting in a change of name into DXN Marketing Sdn Bhd which is now the respondent.

[5] The appellants' distributorship was governed by the terms of the original marketing plan which sets-out the manner in which the commissions and bonuses are calculated. This plan is popularly known as 'the OMP'. This marketing plan remained in place until on or about July 2005 when the respondent unilaterally altered the structure upon which commissions were to be paid. This plan was approved by the relevant regulatory authority and is known as 'Simplified and Improved Marketing Plan' ('the SIMP').

[6] It was the contention of the appellants that the replacement of OMP with SIMP resulted in a sizeable drop in the commissions earned by them. It was the appellants' contention that under the OMP they were able to earn substantial income of approximately RM10,000 per month, each, as at July

2005. With the SIMP, their earnings were alleged to have dropped some 95% in the appellants' incomes, practically overnight.

[7] Despite repeated representations from the appellants, the respondent pressed ahead with the SIMP which resulted in this suit brought by the appellants.

THE HIGH COURT DECISION

[8] From the grounds of judgment, it can be seen that the learned JC had approached the dispute by asking the legal question as to whether, in the light of the relationship between the parties and the documentary evidence, the respondent had the right to unilaterally introduce the SMP.

[9] Her rationale can be found in these paragraphs of her judgment:

> I would say OMP is silent as to whether the defendant can change its marketing plan. This does not mean the defendant cannot do so as there is no express condition prohibiting the defendant from changing the marketing plan to SIMP. In these circumstances a comparison between OMP and SIMP to support the plaintiff's contention that OMP cannot be changed is not tenable when the absence of such a provision does not carry that intention. OMP does not contain provisions binding both parties to it perpetuity.
>
> There is no contract between the plaintiffs and the defendants as the plaintiffs are independent distributors. What exists are marketing plans, OMP and SIMP.

OUR GROUNDS OF DECISION

[10] Learned counsel for the appellants had contended that the existence and implementation of OMP for 11 years had created a contract between the appellants and the respondent and that contract cannot be varied at the 'whims and fancy' of the respondent. Learned counsel relied on the test of the 'officious bystander' expounded in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151.

[11] Further it was submitted that in view of the alleged devastating effect on the earnings of the appellants, OMP cannot be changed without the consent of the appellants.

[12] With respect we disagree with such contention and our reasons are as these. It is our view that schemes like OMP and SIMP are simply marketing schemes. They are designed with the interests of the company and its distributors. It is a balancing act in that the scheme must be such that the company makes a decent profit but attractive enough in terms of earnings for people to become distributors of the company's products. Hence it is only

logical that such schemes must be designed and constructed by the management of the respondent. It is also common sense that such schemes cannot remain in perpetuity for the simple reason that marketing schemes must be flexible so that it can be changed to reflect the prevailing business environment in which the respondent is operating in.

[13] Further as pointed by the learned judge, there is no express provision in the OMP that the respondent cannot amend or dismantle and replace it with a new scheme as with the SIMP in this case. The appellants by their own admission are independent distributors and we cannot see how there could be any contractual relationship with the respondent. Whatever linkage they have with the respondent is simply that as independent distributors they are bound by the marketing scheme employed by the respondent. They were never employed by the respondent. They actually joined the respondent as independent distributors with a view to benefit from the marketing scheme employed by the respondent. And in any event, they are fully entitled to terminate their distributorship if they at any time feel that SIMP or any other marketing scheme is not in their economic or financial interest.

[14] It is also not insignificant that the respondent's conducts, in view of its involvement in direct selling, are regulated by legislation and in this case, it is the Direct Sales and Anti-Pyramid Scheme Act 1993. The SIMP was approved by Ministry of Domestic Trade and Consumer Affairs in 2005 and what that means is that SIMP has statutory force. Even the legislature recognises the fact that such marketing schemes need to change but such change must be done with their consent to protect the public.

[15] Accordingly we see no reasons to intervene as the learned judicial commissioner had not erred in her conclusion.

CONCLUSION

[16] For reasons stated above, we dismissed the appeal with costs of RM40,000, here and below, to the respondent and ordered that the deposit to be paid to the respondent towards account of costs.

Appeal dismissed with costs of RM40,000.

Reported by Ashgar Ali Ali Mohamad